

## FTC's Subscription Deception

Proposed Negative Option Rule has no opt-out from bureaucratic overreach

By Ted Bolema\*

July 28, 2023, No. 288

### Introduction

The Federal Trade Commission (FTC) announced a Negative Option Rule Notice of Proposed Rulemaking (NPRM) on March 23, 2023. The agency claimed this rule was meant to “combat unfair or deceptive practices that include recurring charges for products or services consumers do not want and cannot cancel without undue difficulty.”<sup>1</sup>

When structured appropriately, negative option features can be beneficial for both consumers and sellers. However, a relatively small number of online sellers have used negative options in abusive ways, which has resulted in many online customers having a low opinion of the practice.

“Some businesses too often trick consumers into paying for subscriptions they no longer want or didn’t sign up for in the first place,” FTC Chair Lina Khan said in a news release announcing the proposed rule. She added that the rule would “require that companies make it as easy to cancel a subscription as it is to sign up for one. The proposal would save consumers time and money, and businesses that continued to use subscription tricks and traps would be subject to stiff penalties.”<sup>2</sup>

As a general statement of what the FTC hopes to accomplish with the proposed rule, Chair Khan’s statement sounds very reasonable. The problem, however, is that the proposed rule is not what the FTC claims it is.

The rule is not tailored to protect consumers from the types of abuses described by Chair Khan. The NPRM would create a one-size-fits-all rule that shows little understanding of how businesses actually use negative option features. Most of them have incentives to communicate and administer customer subscriptions and recurring payments clearly and fairly to consumers to avoid reputational harm.

More troubling is that the FTC using the proposed rule would penalize conduct unrelated to negative options. The proposed Negative Option Rule sweeps in conduct regarding underlying product or services that has nothing to do with the negative

option feature. This means online sellers using negative option features in transactions for goods or services could be liable for civil penalties under the proposed rule even if the negative option terms are clearly described, informed consent is obtained from the purchaser, and cancellation is simple. It is an irony that the FTC is engaging in misrepresentation as it sneaks in language about misrepresentations that have nothing to do with negative option features.



Drazen Zlgic/Stock via Getty Images

Why would the agency do this? The FTC suffered a significant loss before the U.S. Supreme Court in 2021 in the *AMG Capital Management, LLC v. FTC* case.<sup>3</sup> Now, the FTC’s proposed Negative Option Rule appears to be an attempt to take enforcement actions under a proposed rule that it is not allowed to do under the *AMG* decision. Thus, it is an end-run around the Supreme Court’s decision in *AMG* to give the FTC civil penalty authority over conduct that is not based on negative option practices.<sup>4</sup>

The FTC also took the unusual step of challenging a company’s use of negative options even before its new proposed Negative Option Rule is in place. On June 21, 2023, the FTC filed a major case against Amazon, claiming the online giant tricked consumers

\* Ted Bolema is an Antitrust and Competition Fellow with the Innovators Network Foundation. He retired in December as Executive Director of the Institute for the Study of Economic Growth at Wichita State University, and previously was a trial attorney with the U.S. Department of Justice’s Antitrust Division.

<sup>1</sup> Federal Trade Commission, “Negative Option Rule” (“NPRM”), *Federal Register*, Vol. 88, No. 78 (April 23, 2023), pp. 24716-24739, <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>.

<sup>2</sup> Federal Trade Commission, “Federal Trade Commission Proposes Rule Provision Making It Easier for Consumers to ‘Click to Cancel’ Recurring Subscriptions and Memberships,” press release, April 24, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>.

<sup>3</sup> *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>4</sup> See Shawn Collins, “Beware of the FTC’s Proposed Changes to The Negative Option Rule... There is a Potential Trojan Horse,” *JDSupra*, June 21, 2023, <https://www.jdsupra.com/legalnews/beware-of-the-ftc-s-proposed-changes-to-4356762/>.

into enrolling into its Prime program and then made it difficult for consumers to cancel their subscriptions.

FTC Chair Lina Khan has been very open about her desire to target Amazon for antitrust and other violations. The way the FTC is rushing forward with a negative option case against Amazon, even before it has its Negative Option Rule in place, suggests that the agency may be driven more by a broader campaign against Amazon, and less by wanting to protect consumers.

The goal for any Negative Option Rule issued by the FTC should be to protect consumers while providing the ability for innovators to scale their methods used to meet consumer expectations in the market. Having an appropriate regulatory structure in place can benefit both online buyers and the sellers who want to use negative option features responsibly but are reluctant to do so because of past abusive practices by a few sellers.

Other types of “protections” may not be helpful to consumers and may actually deprive consumers of choices they would like to have. The FTC’s ill-planned and overly rigid rules for negative options may put some small business innovators’ central role in the growth and sustainability of the U.S. digital economy at risk.

Instead of protecting consumers, it appears that the FTC’s main objective is to use the proposed Negative Option Rule to expand its own regulatory authority and pursue an agenda that has little to do with actual abuses of negative options.

### What are negative options?

A negative option contract contains a term in which the buyer and seller agree that a future offer from the seller will be deemed to be accepted unless the buyer takes action to reject the offer. The most common types of negative option features are:

- **Pre-notification negative options**, by which the purchasers will receive future goods or services, for a charge, unless they specifically reject the offer. Sellers using prenotification negative options provide periodic notices to participating consumers and then ship the product or provide the services if the consumers take no action to decline the offer. Prenotification negative option plans are used by product-of-the-month clubs and popular subscription box services to sell books, music recordings, dog food, cosmetics, wine, and other products, often curated to the customer’s specifications.
- **Continuity negative options**, by which the purchasers agree to be charged for periodic shipments of goods or provision of services until they take action to cancel the agreement. Workplace deliveries of bottled water for employees and customers are commonly arranged through a continuity negative option plan.
- **Automatic renewal negative options**, by which the contract between the purchaser and seller will automatically renew at the end of a fixed period unless the purchaser takes action to cancel the renewal. Examples include gym memberships and magazine subscriptions that are set up to be renewed at the end of the

current subscription term unless the customer cancels or suspends the contract.

- **Free-to-pay negative options**, by which the purchasers receive a good or service for free or at a heavily discounted price for an introductory period. After the introductory period, customers will be charged for future goods or services unless they cancel before the end of the trial period. For example, premium cable television channels and video streaming services are often offered for free for an initial period, such as 60 days. After the initial period, the customer is charged the regular price for the channel until the customer cancels the service.

When structured appropriately, negative option features can be beneficial for both consumers and sellers. For example, free trial marketing can encourage customers to try a company or brand they might otherwise not have purchased, while giving the seller an incentive to offer the trial for free or for a heavy discount. To the extent such arrangements lead to more transactions for the seller, the seller can spread its fixed costs over a greater customer base, allowing it to lower prices for all customers. Attracting more customers through such offers also allows the seller to generate more customer reviews, even if they come from customers who do not renew, which can give guidance to future customers and allow the company to use the feedback to address areas in which it can improve.

A 2009 report by the FTC’s Division of Enforcement summarized some of the benefits of negative option arrangements:

Negative option offers can benefit sellers by allowing them to stock inventory more efficiently because they can ship products to consumers on a predetermined schedule. In addition, negative options help sellers avoid costs related to renewals. These decreased operating costs can generate increased profit. Consumers also can benefit from negative option offers by receiving uninterrupted service, often with a greatly simplified renewal process. In some plans, consumers can examine products before purchasing. Because consumers must take action to cancel contracts, which they may consider burdensome, sellers may provide buyers up-front benefits, such as introductory gifts or free trials, to entice them to agree to the offer.<sup>5</sup>

However, negative option plans have obvious potential for harm to customers. A relatively small number of online sellers have used negative options in abusive ways, which has resulted in many online customers having a low opinion of the practice. These sellers may gain profits in the short run, but any benefits of the practice to sellers are likely to be short-lived, while the harm to the reputation of the seller and other online sellers can be long-lasting.

As former FTC Commissioner Christine Wilson acknowledged when she dissented from the NPRM, there are good reasons to believe that negative options are being abused:

<sup>5</sup> Federal Trade Commission, *Negative Options: A Report by the staff of the FTC’s Division of Enforcement*, January 2009, p. 3, <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>.

The comments received in response to the ANPR [Advanced Notice of Proposed Rulemaking], consumer complaints, and the Commission's enforcement actions demonstrate that abuses in negative option marketing persist despite our active enforcement in this area. As the NPRM explains, some marketers misrepresent or fail to disclose clearly and conspicuously the terms, or even the existence, of negative option features; fail to obtain consumers' express, informed consent to the recurring charges; fail to provide a simple mechanism to cancel; and/or engage in activities designed to frustrate consumers' ability to cancel.<sup>6</sup>

Thus, the practice of using negative options today has a somewhat shady reputation with some online sellers and their customers. Many sellers who might otherwise benefit from using negative options avoid doing so because they see potential for harm to their reputation even if they use negative options to the benefit of their customers. Having an appropriate regulatory structure in place can benefit both online buyers and the sellers who want to use negative option features responsibly but are reluctant to do so because of past abusive practices by other sellers.

### Current negative option regulations

The FTC already has a negative option rule, which has been in place since 1973. The 1973 Negative Option Rule applies to prenotification negative option plans. This rule requires companies to provide buyers with clear and conspicuous information about negative option plans in the promotional materials purchasers use to enroll or make purchases. For example, sellers must disclose any minimum purchase obligation, how and when the purchaser may cancel the enrollment, the procedure for rejecting merchandise, the deadline for returning a rejection form to avoid a shipment of merchandise, and other relevant terms such as postage and handling charges.<sup>7</sup>

An important related statute that is enforced by the FTC is the Restore Online Shoppers' Confidence Act (ROSCA).<sup>8</sup> ROSCA was enacted in 2010 in response to a notorious practice at the time in which sellers did not make clear to online purchasers at the time of checkout that they were consenting to a transfer of their billing information to a third-party. The third-party would then lock the purchasers into recurring charges without adequate notice and consent and made it difficult for the purchasers to cancel the recurring charges.

ROSCA states that goods and services transactions with negative option features must "clearly and conspicuously disclose all material terms *of the transaction* before obtaining the consumer's billing information" (emphasis added).<sup>9</sup> It is important to note that these disclosures relate to the terms of the transaction itself, and not to any claims or material facts about the underlying good or service. In other words, if an online sale contains a negative option, that does not give the purchaser any more legal rights regarding the underlying product or service than the purchaser has with an online transaction that does not include a negative option.

In addition to the 1973 Negative Option Rule and ROSCA, other statutes and rules are enforced by the FTC that apply to negative options and to arrangements that are similar to negative options. These include the Telemarketing Sales Rule (TSR),<sup>10</sup> the Unordered Merchandise Rule,<sup>11</sup> and the Electronic Funds Transfer Act.<sup>12</sup> Notably, the TSR is the only one of these rules or statutes that contains language that applies to misrepresentations regarding the underlying product, although it is limited to sales by telephone under a very specific set of conditions.<sup>13</sup>

### The proposed Negative Option Rule

The 2023 Proposed Negative Option Rule claims that it will "enhance and clarify existing requirements currently dispersed in other rules and statutes."<sup>14</sup> However, the proposed rule will do much more than that, because the FTC asserts that the proposed rule will cover conduct and misrepresentations regarding the underlying product or service that have nothing to do with the negative option feature.

The FTC's specific language for its proposed Negative Option Rule is as follows:

In connection with promoting or offering for sale any good or service with a negative option feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the FTC Act for the negative option seller to fail to provide a simple mechanism for a consumer to cancel the negative option feature and avoid being charged for the good or service and immediately stop any recurring charges.<sup>15</sup>

Much of the rest of the proposed rule provides additional details on what the FTC will consider to be an adequate mechanism for canceling the negative option feature. The FTC provides a substantial amount of detail explaining what it expects sellers to do to make canceling negative options easy for consumers. As

<sup>6</sup> Christine S. Wilson, "Dissenting Statement of Commissioner Christine S. Wilson, Notice of Proposed Rulemaking, Negative Option Rule" ("Wilson dissent"), March 23, 2023, pp. 1-2, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/commissioner-wilson-dissent-negative-option-rule.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissent-negative-option-rule.pdf).

<sup>7</sup> 16 C.F.R. Part 425. If the seller's sales presentation for a plan is made orally, such as on the phone, the terms and conditions must be disclosed clearly and conspicuously during the presentation.

<sup>8</sup> 15 U.S.C. §§ 8401-8405.

<sup>9</sup> 15 U.S.C. § 8403.

<sup>10</sup> 16 C.F.R. Part 310.

<sup>11</sup> 39 U.S.C. § 3009.

<sup>12</sup> 15 U.S.C. §§ 1693-1693r.

<sup>13</sup> As former FTC Commissioner Christine Wilson noted in her dissent, the TSR requires "a substantial evidentiary basis establishing that outbound telemarketing routinely was used as a vehicle for fraud and deception, marketers disturbed consumers in the solitude of their homes, and subjected them to deception and aggressive sales tactics that caused significant consumer injury." Wilson dissent at p. 5.

<sup>14</sup> NPRM at p. 24726.

<sup>15</sup> NPRM at p. 24735.

discussed below, providing these detailed requirements may be helpful in many circumstances, but the FTC is putting forth a one-size-fits-all set of requirements that does not appear to be well grounded in an understanding of how business is conducted online.

Another part of the proposed rule makes it explicit that the FTC intends to use the proposed Negative Option Rule to regulate conduct unrelated to negative options. It reads:

In connection with promoting or offering for sale any good or service with a negative option feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (“FTC Act”) for any negative option seller to misrepresent, expressly or by implication, any material fact related to the transaction, such as the negative option feature, *or any material fact related to the underlying good or service* (emphasis added).<sup>16</sup>

The structure proposed by the FTC is a one-size-fits-all approach that often will not serve the interests of either purchasers or sellers but will increase the regulatory power of the FTC. As such, there is good reason to be suspicious that the FTC is rushing the proposed Negative Option Rule NPRM forward for reasons that serve the interest of the FTC more than the interests of consumers.

### One-size-fits-all follies

Online sellers come in all sizes. Small- and medium-sized-business sellers and developers online must compete vigorously to gain and maintain consumers. This competition gives them the incentive to communicate and administer customer subscriptions and recurring payments clearly and fairly to consumers, lest they risk harming their reputations. Indeed, one of the ways these online businesses compete is in developing a broad range of customer relationship choices, ranging from free and ad-supported approaches to a variety of subscriptions.

The FTC’s proposed Negative Option Rule contains terms and requirements that unnecessarily create compliance difficulties for businesses in ways that likely provide little or no benefit to online consumers. First, the proposed rule shifts the Negative Option Rule from a more outcome-centered regulatory approach in the 1973 rule to a new approach that dictates how compliance should occur. In doing so, the FTC would deny businesses much of the flexibility they need to most effectively communicate with consumers, as well as to evolve those means over time. For example, the proposed Negative Option Rule would mandate where, and in what sequence, subscription information for consumers must be featured, as well as which day of the month a subscriber is charged. It is not at all clear how such a rigid structure provides any meaningful benefits to most online customers.

Second, the proposed rule uses vague language at places that could create difficulty for sellers as they try to comply with the updated Negative Option Rule. For example, the FTC proposes that subscription cancellations must be “as simple as initiation”

without any further details. The problem with that statement is that signing up and canceling subscriptions are entirely different experiences for both consumers and sellers, so evaluating which one is simpler is not nearly as easy as the FTC makes it sound.

Third, the proposed Negative Option Rule likely will cause unhelpful duplication or overlap with related federal and state laws. For example, the rigid requirements created by the proposed rule appear to create conflicts with existing federal-level requirements, such as the existing (ROSCA) standards for ease of cancellation. Perhaps more importantly, since the FTC proposed rule would not pre-empt state law, it would potentially create conflicts with over a dozen state-level requirements for negative options, so sellers may find it difficult or impossible to comply with both the state rules and the FTC’s proposed Negative Option Rule.

Fourth, and probably most importantly, the various rules proposed by the FTC give the impression they were written by the FTC leadership and staff with little appreciation for how the businesses they are seeking to regulate actually operate. Then-Commissioner Christine Wilson described the potential harmful impacts from the FTC proceeding with a rulemaking that does not make the effort to understand how businesses actually use negative option features:

[W]e know that negative option marketing is used lawfully and non-deceptively in a broad array of common transactions – newspaper subscriptions, video streaming services, delivery services, etc. Will the expansion of the Rule as proposed discourage companies from using negative option features, that consumers prefer and enjoy, because of potential liability? Does the inclusion of product efficacy and any other material information in this proposed Rule over-deter the negative option abuses that the Rule purportedly was primarily designed to prevent? The Notice does not discuss these issues. I encourage the public to address these issues in their comments in response to this Notice.<sup>17</sup>

With so much competition in most markets online, and so many alternatives that are easily available in and across platforms, most online sellers and other types of business developers are guaranteed to lose customers, and fail to gain new customers, if they do not meet customer expectations for transparency, communication, and fairness. This healthy competitive dynamic should be encouraged by competition authorities like the FTC.

It is important that any changes made to the Negative Option Rule strike an appropriate balance between protecting consumers and allowing online businesses the flexibility to scale up and create approaches to meet consumer expectations through outcome-driven guidelines that provide for flexibility in compliance. The proposed Negative Option Rule takes the opposite approach, by creating an unnecessarily rigid one-size-fits-all set of requirements for all online sellers of goods and services who use negative option terms.

<sup>16</sup> NPRM at p. 24734.

<sup>17</sup> Wilson dissent at p. 3.



## Conduct unrelated to negative options

The language of the proposed Negative Option Rule plainly states that the FTC intends for the rule to reach beyond the terms of any negative option feature. As dissenting Commissioner Wilson pointed out:

The Notice confirms that the scope of this provision is intended to extend beyond the terms of the negative option feature. Specifically, the Notice explains that “the proposed Rule prohibits any person from misrepresenting, expressly or by implication, any material fact regarding the entire agreement – not just facts related to a negative option feature.” It further explains that “[s]uch deceptive practices may involve misrepresentations related to costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation, or any other material representation.”<sup>18</sup>

While almost all of the focus of the text of the FTC’s Negative Option Rule NPRM is on the harms to consumers from misleading negative option features, the proposed Negative Option Rule sweeps in conduct regarding the underlying product or services that has nothing to do with the negative option feature.

This means that online sellers using negative option features in transactions for goods or services could be liable for civil penalties or redress under the proposed rule for “costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation, or any other material representation” even if the negative option terms are clearly described, informed consent is obtained from the purchaser, and cancellation is simple.<sup>19</sup>

Wilson provided several examples of how the FTC could use the proposed Negative Option Rule to reach conduct unrelated to the negative option feature:

Consider a dietary supplement marketed with a continuity plan that is advertised to relieve joint pain. The Commission alleges the joint pain claims are deceptive and unsubstantiated. The Rule could apply. A grocery delivery service offered via subscription asserts that the consumer’s shopping lists will not be shared, but in fact the service does share the information for advertising purposes – a privacy misrepresentation. The Rule could apply. Cosmetics purchased through a monthly subscription service are marketed as Made in USA but in fact are made elsewhere. The Rule could apply.<sup>20</sup>

Wilson added that the NPRM is not based on any evidentiary record:

The Commission is authorized to issue a notice of proposed rulemaking when it “has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.” Importantly, we did not seek comment in the ANPR about whether an expanded negative option rule should address general misrepresentations; no comments are cited in the NPRM to support the inclusion of these provisions. Absent the above quoted brief explanation with the accompanying case cites, the Notice does not offer evidence that negative option marketing writ large is permeated by deception.<sup>21</sup>

It is rather ironic that the FTC is engaging in a misrepresentation of its own as it sneaks in language about misrepresentations related to the underlying product or services that have nothing to do with the negative option feature. What might the FTC be trying to accomplish with this rule? There are at least two reasons to believe the agency is pursuing other agendas with this rather deceptive approach to use the proposed Negative Option Rule to reach conduct unrelated to negative options.

## Working around the Supreme Court

The FTC suffered a significant loss before the U.S. Supreme Court in 2021 in the *AMG Capital Management, LLC v. FTC* case.<sup>22</sup> In that case, the Supreme Court unanimously ruled that language referring to the FTC issuing a “permanent injunction” under Section 13(b) of the FTC Act could not be read to give the FTC the authority to obtain monetary relief directly in federal court.<sup>23</sup> The Supreme Court was unwilling to allow the FTC to interpret general and non-specific language in the FTC Act as giving the FTC broad substantive powers.

The FTC’s proposed Negative Option Rule appears to be an attempt to take enforcement actions under the proposed rule that it is not allowed to do under the *AMG* decision. One commentator described this language in the proposed rule as a “potential Trojan Horse,” in that it would be an “end-run around the Supreme Court’s decision in *AMG*” to give the FTC civil penalty authority for conduct by companies using negative options that are unrelated to the company’s actual negative option practices.<sup>24</sup>

Wilson pointed out that this rule is part of a pattern of the current FTC leadership to use rulemaking to attempt to expand the agency’s powers and scope of authority:

In the wake of *AMG*, this Commission has proposed broad, sweeping rules for privacy and data security (the Commercial Surveillance and Data Security ANPR), as well as pricing and fees (the “junk fees” or Unfair or

<sup>18</sup> Wilson dissent at p. 2.

<sup>19</sup> Shawn Collins, “Beware of the FTC’s Proposed Changes to The Negative Option Rule... There is a Potential Trojan Horse,” JDSupra, June 21, 2023, <https://www.idsupra.com/legalnews/beware-of-the-ftc-s-proposed-changes-to-4356762/>.

<sup>20</sup> Wilson dissent at p. 2.

<sup>21</sup> Wilson dissent at p. 3.

<sup>22</sup> *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>23</sup> Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b), authorizes the FTC to seek preliminary and permanent injunctions to remedy “any provision of law enforced by the Federal Trade Commission.”

<sup>24</sup> See Shawn Collins, “Beware of the FTC’s Proposed Changes to The Negative Option Rule... There is a Potential Trojan Horse,” JDSupra, June 21, 2023, <https://www.idsupra.com/legalnews/beware-of-the-ftc-s-proposed-changes-to-4356762/>.

Deceptive Fees ANPR). As I noted in my dissents, the scope of those proposals extended far beyond practices for which Commission law enforcement and other evidence have established a prevalence of deceptive or unfair practices. In July 2021, this Commission promulgated a final Made in USA labeling rule that include a definition of “labeling” that, in my view, went beyond our Congressional authority to regulate labels. The Commission also has employed or announced novel applications of our existing rules that I believe similarly extend beyond our regulatory authority. For example, in September 2021, the Commission issued a Policy Statement on Breaches by Health Apps and Other Connected Devices that included a novel interpretation of the Health Breach Notification Rule that expanded both the covered universe of entities and the circumstances under which the Commission will initiate enforcement.<sup>25</sup>

Following the *AMG* decision, it seems unlikely that federal courts will allow this unilateral expansion of regulatory authority by the FTC. But the legal process of stopping federal agencies from engaging in such conduct takes time and the outcome is uncertain, and in the meantime, there will be harm to consumers, businesses, and the economy as a whole that could have been avoided.

### Challenging Amazon even before the rule is finalized

On June 21, 2023, the FTC filed a major case against Amazon, claiming the online giant tricked consumers “to enroll consumers into its Prime program without their consent while knowingly making it difficult for consumers to cancel their subscriptions to Prime.”<sup>26</sup>

According to FTC Chair Khan, “Amazon tricked and trapped people into recurring subscriptions without their consent, not only frustrating users but also costing them significant money. . . . These manipulative tactics harm consumers and law-abiding businesses alike. The FTC will continue to vigorously protect Americans from ‘dark patterns’ and other unfair or deceptive practices in digital markets.”<sup>27</sup>

Amazon strongly disputes the claims made by the FTC,<sup>28</sup> as have many legal and technology policy analysts and advocates.<sup>29</sup>

Khan’s allegation that Amazon uses “dark patterns” to keep consumers from unsubscribing requires a little explanation. The term “dark patterns” usually refers to deliberately deceptive tactics to customers into doing something they otherwise would not do. But the FTC is using the term in a very different way, to refer to any practice that might attempt to persuade consumers not to opt out of a negative option feature.

The FTC’s redefinition of dark patterns in this way vilifies every negative option plan, as well as many other standard practices by sellers, most of which have little or no potential for causing harm to consumers. As IT expert Daniel Castro recently wrote about the FTC’s use of such ominous-sounding terms to describe common business practices:

If the FTC continues down this path of labeling data-driven design practices as potentially illegal activity and conflating illegal practices with bad design, businesses will face a legal minefield where they will face penalties for failing to anticipate regulators’ subjective analysis of their product design decisions, ultimately limiting the development of better online apps, games, and services for consumers. Moreover, if the FTC continues to promote misleading terms like “dark patterns” and “surveillance economy” to attack the tech industry, then it risks further eroding its credibility as an objective regulator. Instead of seeking to inject regulators into the design of more online services—a skillset the average regulator does not have—the FTC should keep its focus on enforcing the laws already on the books to protect consumers.<sup>30</sup>

Khan has been very open about her desire to target Amazon for antitrust and other law violations. One of her earliest antitrust publications was entitled “Amazon’s Antitrust Paradox,” in which she claimed that Amazon keeps its prices very low to get people to buy from Amazon and drive its competitors out of business, after which Amazon will be dominant and will be able to raise its prices and profits.<sup>31</sup> Indeed, Amazon filed a petition seeking to have Chair Khan recused from FTC matters involving Amazon based on her history of repeated criticisms of the company.<sup>32</sup>

The FTC has targeted Amazon with other lawsuits, and is likely preparing a major antitrust complaint aimed at the company’s

<sup>25</sup> Wilson dissent at pp. 2-3.

<sup>26</sup> *FTC v. Amazon.com, Inc.*, “Complaint for Permanent Injunction, Civil Penalties, Monetary Relief, and other Equitable Relief,” U.S. District Court, Western District of Washington, Civil Action No. 2:23-cv-0932, June 21, 2023, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/amazon-rosca-public-redacted-complaint-to\\_be\\_filed.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/amazon-rosca-public-redacted-complaint-to_be_filed.pdf).

<sup>27</sup> Federal Trade Commission, “FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent and Sabotaging Their Attempts to Cancel,” press release, June 21, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their>.

<sup>28</sup> Amazon spokesperson Heather Layman responded to the complaint by saying that FTC’s claims are “false on the facts and the law” and “The truth is that customers love Prime, and by design we make it clear and simple for customers to both sign up for or cancel their Prime membership.” Annie Palmer, “FTC Sues Amazon Over ‘Deceptive’ Prime Sign-Up and Cancellation Process,” CNBC, June 21, 2023, <https://www.cnbc.com/2023/06/21/ftc-sues-amazon-over-deceptive-prime-sign-up-and-cancellation-process.html>.

<sup>29</sup> See, e.g., “Experts Express Concerns with FTC’s Complaint Against Amazon Prime,” Springboard, June 29, 2023, <https://springboardccia.com/2023/06/29/experts-express-concerns-with-ftcs-complaint-against-amazon-prime/>.

<sup>30</sup> Daniel Castro, “The FTC’s Efforts to Label Practices ‘Dark Patterns’ Is an Attempt at Regulatory Overreach that Will Ultimately Hurt Consumers,” Information Technology & Innovation Foundation, January 4, 2023, <https://itif.org/publications/2023/01/04/the-ftcs-efforts-to-label-practices-dark-patterns-is-an-attempt-at-regulatory-overreach-that-will-hurt-consumers/>.

<sup>31</sup> Lina M. Khan, “Amazon’s Antitrust Paradox,” *Yale Law Journal*, Vol. 126, No. 3 (January 2017), p. 3.

<sup>32</sup> Brent Kendall, “Amazon Seeks Recusal of FTC Chairwoman Lina Khan in Antitrust Investigations of Company,” *Wall Street Journal*, Jun 30, 2021, <https://www.wsj.com/articles/amazon-seeks-recusal-of-ftc-chairwoman-lina-khan-in-antitrust-investigations-of-company-11625067962>.

core business.<sup>33</sup> Thus, the way the FTC is rushing forward with a negative option case against Amazon, even before it has its Negative Option Rule in place, suggests that the FTC's agenda with the proposed Negative Option Rule may be driven to an unhealthy extent by a broader campaign against Amazon, and less by wanting to protect consumers.

## Conclusion

Consumers may well benefit from a well-designed revision to the 1973 Negative Option Rule and other statutes and rules that pertain to negative options by bringing clarity to all of the regulatory requirements for negative options. But it is not at all clear that what the FTC is proposing will do much to address actual consumer harm in the current market.

Given that existing legal requirements from ROSCA, TRS, and other regulations already provide much-needed consumer protections today, the FTC has not made the case that its proposed Negative Option Rule will address any systemic issues that existing requirements do not already address. Instead, the NPRM raises concerns that the FTC is not trying to tailor its new regulation to current problems, and instead is using it to pursue other agendas.

The FTC should pause and reconsider any alternatives to the Negative Option Rule. Before proceeding, the FTC should do more to work with online sellers, consumers, and others impacted by FTC's Negative Option Rule proposals to better understand the U.S. digital economy, the state of competition in the U.S. digital economy, and the role of subscriptions in meeting customer demands across the U.S. digital economy before advancing its proposals. The agency could gain this understanding through a series of public workshops that feature inclusive and open dialogues.

The FTC should also reorient its proposals to take outcome-based approaches that will preserve the ability for small and innovative businesses to find unique ways to differentiate themselves in the market, avoid ambiguities, and mitigate the potential for regulatory conflict with federal and state requirements for negative option offerings.

Only once these further needed steps have been taken should the FTC proceed to update to the Negative Option Rule.

---

<sup>33</sup> Jon Brodtkin, "FTC Prepares 'the Big One,' a Major Lawsuit Targeting Amazon's Core Business," ARSTechnica, June 29, 2023, <https://arstechnica.com/tech-policy/2023/06/ftc-prepares-the-big-one-a-major-lawsuit-targeting-amazons-core-business/>.



The Competitive Enterprise Institute promotes the institutions of liberty and works to remove government-created barriers to economic freedom, innovation, and prosperity through timely analysis, effective advocacy, inclusive coalition building, and strategic litigation.

**COMPETITIVE ENTERPRISE INSTITUTE**

1310 L Street NW, 7th Floor

Washington, DC 20005

202-331-1010